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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. BARRY LAMAR BONDS, Defendant.	No. CR 07-0732-SI **UNITED STATES'S OPPOSITION TO DEFENDANT'S ORAL MOTION TO LIMIT THE GOVERNMENT'S USE OF THE TESTIMONY OF OTHER ATHLETES** Date: April 6, 2011 Time: 8:30 a.m. Judge: The Honorable Susan Illston

On March 7, 2011, this Court entered an Order Denying Defendant's Third Motion in Limine (the "Order," Document 275), which specifically allowed the testimony of other athletes who had obtained steroids and other performance-enhancing drugs from Greg Anderson. That order established guidelines for the use of such testimony, stating that the jury would be permitted to consider how Anderson provided drugs to other athletes as evidence about how he may have provided them to the defendant. Order at 4-5.

At trial, the government followed the Court's guidelines and suggestion of restraint and at

trial called four (instead of seven) athletes: Jason Giambi, Jeremy Giambi, Marvin Benard, and Randy Velarde. These witnesses testified about receiving steroids, human growth hormone, and other performance-enhancing drugs from Anderson, as well as receiving advice on application methods, and the detectability of the items to drug testing.

On April 5, 2011, the defendant filed a Motion to Strike the Testimony of Other Athletes ("the Motion," Document 339), requesting that the Court strike the testimony of all four athletes. At the motion hearing on April 5, 2011, however, the Court stated that it was inclined to deny the defendant's motion to strike the testimony (04/05/11 Tr. at 1772), and the defendant did not challenge the Court's ruling in that regard. 04/05/11 Tr. at 1773. Instead, the defendant orally requested that the Court prohibit the government from arguing a modus operandi theory based on that evidence to the jury. In support, the defendant claimed that when the Court had denied his Third Motion in Limine, "we were talking about eight or nine athletes," but at trial, the government only called four athletes and their testimony revealed no "common pattern" as to what Anderson said to these athletes when he provided them with performance-enhancing drugs. *Id.* Because, according to defendant, there was no "common pattern," the government should be precluded from arguing to the jury that "there's a pattern in the treatment if these four athletes that is inferable as a manner in which he treated Mr. Bonds." 04/05/11 Tr. at 1774.

There is no basis for the Court its change its pretrial ruling that the government may argue that "it is proper for the government to argue that Mr.Anderson's practices made it likely that clients knew the nature of the substances Mr. Anderson provided them; and thus *if* defendant were a client and *if* Mr. Anderson provided defendant with substances, then it is more probable that defendant knew the nature of the substances Mr. Anderson provided him." Order at 6. In denying the defendant's pretrial motion seeking to strike the testimony of the athletes in its entirety, the Court explicitly noted that the government's proffered use of the other athletes' testimony did not fit the usual modus operandi evidence "which is typically introduced to prove the identity of the perpetrator of a crime." *Id.* at 4 n.3. In other words, the Court has already concluded that this was not a case in which the government was relying upon "evidence of a unique, uncommon thing that the defendant once did in order to prove that the defendant is guilty

of a crime." *Id.* Rather,

> the government is arguing that *if* Mr. Anderson provided defendant with performance enhancing drugs, then the jury may look to how Mr. Anderson provided drugs to other athletes to make inferences about how he provided them to defendant. Thus, similarity between how Mr. Anderson acted with different athletes is important—and the transcripts provided by both defendant and the government show that the similarity is there. But there is no reason to superimpose the question of uniqueness onto a case that has nothing to do with the question of identity.

Id. Thus, as the Court ruled pretrial, this is *not* a situation where "the uniqueness of the thing is vitally important." *Id.* Defendant's arguments that there was insufficient evidence of "common practice" because the athletes did not provide an "identifiable" or unique pattern is thus beside the point.

In fact, pretrial, the Court correctly anticipated that there may be certain differences from athlete to athlete in their experiences with Anderson and performance-enhancing drugs, and that those differences did not affect the Court's decision:

> [I]t shows that Mr. Anderson had a general "plan"—and what that general plan was—for how to distribute performance enhancing drugs to athletes, how to communicate about these performance enhancing drugs with inquiring athletes, and how to allay concerns of athletes worried about testing positive for performance enhancing drugs or generally being accused of using steroids. Mr. Anderson may well have tailored that plan to individual athletes and individual circumstances.

Id. at 5. The fact that the athletes may not have testified in lockstep, therefore, does nothing to undercut the Court's initial decision to allow the government to argue that the athletes' testimony regarding the manner in which they received performance-enhancing drugs from Anderson bears on the question of, as the Court itself put it, "Mr. Anderson's practices" and thus to show that "*if* defendant were a client and *if* Mr. Anderson provided defendant with substances, then it is more probable that defendant knew the nature of the substances Mr. Anderson provided him."

Finally, defendant's claim that the Court should alter its pretrial Order because the government proffered the testimony of seven athletes at the pretrial conference (Order at 2), and yet called only four to testify at trial is without merit**.** The four witnesses all similarly testified that they received performance-enhancing drugs from Anderson. To the extent that there are any

meaningful differences in the testimony between the athletes regarding their relationship to Anderson and the manner in which they received drugs from him, defendant is free to argue those differences to the jury.

CONCLUSION

For the above-stated reasons, the government respectfully requests that the defendant's request to prohibit the government from arguing modus operandi evidence to the jury be denied.

DATED: April 5, 2011

Respectfully submitted,

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